FILED BY CLERK
JUL 29 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | |
|---|---|
| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>ALFREDO ANGEL GODOY,<br><br>Appellant. | 2 CA-CR 2006-0103<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20050821

Honorable Howard Hantman, Judge

AFFIRMED

---

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery
Tucson
Attorneys for Appellant

---

V Á S Q U E Z, Judge.

**¶1** After a jury trial, Alfredo Godoy was convicted of one count of burglary, five counts of kidnapping, two counts of endangerment, and four counts of aggravated assault with a deadly weapon. The charges arose from Godoy's kidnapping of his former girlfriend with the aid of five other men from the residence she and her boyfriend shared with the boyfriend's family. The jury found all of the offenses were of a dangerous nature and that two of the aggravated assault charges involved victims under the age of fifteen and were dangerous crimes against children pursuant to A.R.S. § 13-604.01. The trial court sentenced Godoy to a total of twenty-seven years in prison. On appeal, Godoy challenges only his sentences on the two aggravated assault charges involving victims under the age of fifteen, arguing the court failed to properly instruct the jury on what constituted a dangerous crime against children for purposes of § 13-604.01. For the reasons set forth below, we affirm.

**Facts and Procedural Background**

**¶2** We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On February 14, 2005, Albert C. and his two youngest sons, ages six and twelve, walked from their residence to a nearby convenience store around 11:00 p.m. While inside the store, Albert noticed a white car parked nearby with a number of men inside, including Godoy. One of the men got out of the car and looked into the store, apparently watching Albert and the two boys. The same car drove very slowly past the three as they walked home and appeared to be following them. As Albert and the boys walked into their front yard, the men approached the house from where they had parked the car. Albert told the boys to get in the house, and before Albert

could get inside, Godoy and the five other men confronted him. One of the men produced a handgun, which was passed to Godoy who repeatedly asked Albert the whereabouts of his nineteen-year-old son, Johnny. Johnny was engaged to Godoy's former girlfriend, Rebecca S., and the two lived at the residence. When Albert answered that Johnny did not live there, Godoy struck him in the mouth with the gun and then forced him inside the house.

**¶3** Once inside, Godoy handed the gun to another man and then went from room to room looking for Rebecca. As Godoy did so, the other men kept Albert and his family in the living room at gunpoint. Two of the men had actually taken turns holding the gun, and at various times pointed it at Albert and his two sons, twelve-year-old Julian and fourteen-year-old Jose. Godoy found Rebecca and told her to go into the living room. The man holding the gun at the time pointed it at Rebecca and said, "Let's go." When Rebecca refused, Godoy picked her up by the waist, and when she struggled, grabbed her by the hair and dragged her out to the car. They then left in the car and eventually stopped at Godoy's sister's apartment. After the men left with Rebecca, Albert called the police and Godoy surrendered.

**¶4** Godoy was charged with a total of seventeen counts and after a four-day trial, the jury found him guilty of the twelve counts noted above. The jury also specifically found that two of the counts of aggravated assault had involved victims under the age of fifteen and were dangerous crimes against children. The trial court sentenced Godoy to consecutive, enhanced, mitigated, ten-year prison terms for these offenses, to be served consecutively to

the concurrent prison terms it imposed on the remaining counts, the longest of which was seven years. This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4033(A).

## Discussion

### I. Dangerous Crimes Against Children Jury Instruction

**¶5** Godoy argues the trial court was required *sua sponte* to instruct the jury that it could not find he had committed dangerous crimes against children unless it found his conduct had been "focused and directed" at victims under the age of fifteen. Because he failed to request such an instruction at trial, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Lucas*, 146 Ariz. 597, 603-04, 708 P.2d 81, 87-88 (1985), *overruled in part on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996) (trial court's failure to *sua sponte* give jury instruction reviewed for fundamental error).

**¶6** Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To obtain relief under fundamental error review, a defendant must prove: (1) that error occurred; (2) that the error was fundamental; and (3) that the error was prejudicial." *State v. Avila*, 217 Ariz. 97, ¶ 9, 170 P.3d 706, 708 (App. 2007).

**¶7** Relying on *State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993), Godoy contends "the dangerous-crime-against-children determination requires something

more than a finding that the defendant committed aggravated assault against a minor under fifteen." Citing *Blakely v. Washington*, 542 U.S. 296 (2004), he asserts that jurors are required to make findings of fact necessary to expose defendants to enhanced punishment. "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 301, *quoting Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). And quoting *Williams*, he suggests the § 13-604.01 enhancement applies only when a jury determines beyond a reasonable doubt that the defendant's conduct was "focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen." 175 Ariz. at 103, 854 P.2d at 136. Thus, Godoy argues the jury instructions omitted a necessary element for sentencing under § 13-604.01.

**¶8** In *Williams*, the defendant was convicted of aggravated assault for recklessly driving his truck into the back of a station wagon and seriously injuring a fourteen-year-old boy. 175 Ariz. at 99, 854 P.2d at 132. Because the victim of the aggravated assault was under the age of fifteen, the trial court found the offense constituted a "dangerous crime against children" and imposed an enhanced sentence under § 13-604.01. The supreme court vacated the sentence, stating: "The spirit and purpose of § 13-604.01 are not well served by applying it to people like Williams who do not prey upon helpless children but who fortuitously injure children by their unfocused conduct." *Id.* at 103, 854 P.2d at 136. "[E]ven when a defendant is convicted of one of the statutorily enumerated crimes and the victim is younger than fifteen, 'something more' is required to activate the special sentencing

provisions of the statute." *State v. Sepahi*, 206 Ariz. 321, ¶ 8, 78 P.3d 732, 733 (2003); *quoting Williams*, 175 Ariz. at 102, 854 P.2d at 135. "[T]he defendant's conduct must be focused on, directed against, aimed at, or target a victim under the age of fifteen." *Williams*, 175 Ariz. at 103, 854 P.2d at 136.

**¶9** Godoy argues, in this case, the jury failed to find the "something more" because, "[t]he verdict forms . . . equated the dangerous-crime-against-children determination with an offense element the jury had already found to convict on the offenses—that the 'offense involved a victim under the age of 15, a dangerous crime against children.'" But Godoy's reliance on *Williams* is misplaced. There, the court stated, "[t]he issue we resolve only arises in that rare case where, as here, an enumerated offense can be committed by unfocused actions, whether intentional, knowing or reckless in nature." *Id*. at 104, 854 P.2d at 137.

**¶10** When an enumerated offense under § 13-604.01 cannot be committed without targeting a victim under fifteen years of age, applicability of § 13-604.01 is inherent in the jury verdict. "As a practical matter, the question of whether the child victim is the target of the defendant's criminal conduct will rarely be an issue given the nature of the crimes listed in [the statute]." *Williams*, 175 Ariz. at 103-04, 854 P.2d at 136-37; *see also State v. Fernandez*, 216 Ariz. 545, ¶ 27, 169 P.3d 641, 649 (App. 2007) (jury could reasonably conclude from evidence at trial that defendant's conduct "targeted each of the victims who was in the line of his fire"); *State v. Miranda-Cabrera*, 209 Ariz. 220, ¶¶ 28-30, 99 P.3d 35, 41-42 (App. 2004) (harmless error to enhance sentence under § 13-604.01 without separate

finding that defendant targeted child victim where "no reasonable jury would fail to find the factor's existence beyond a reasonable doubt").

**¶11** Here, aggravated assault with a deadly weapon is one of the offenses listed in the statute. § 13-604.01(N)(1)(b). Although that crime can conceivably involve an untargeted child victim, *see Williams*, 175 Ariz. at 101, 854 P.2d at 134, the charges in this case were based on conduct specifically targeted at two victims who were under the age of fifteen. Godoy intentionally entered the victims' home with the five other men to kidnap his former girlfriend. He knew there were children in the house before he entered it. He knew a gun was being brought into the house; indeed he had used it to pistol-whip one of the victims. While others were brandishing the gun, he grabbed his former girlfriend by the hair and dragged her outside. Godoy does not dispute that two of the other men intentionally pointed the gun at the two victims who were under fifteen years of age. This conduct was not fortuitous or unfocused; rather the entire event was targeted at the whole family, including the two victims under fifteen years of age.

**¶12** The jury expressly found beyond a reasonable doubt that Godoy's conduct was sufficient to support the convictions for aggravated assault against two boys under the age of fifteen. Thus, under the circumstances of this case, where it was undisputed that the conduct in question intentionally targeted these two victims, the factual predicate necessary to support the jury's additional finding that Godoy had committed dangerous crimes against children was inherent in its verdict. Thus, even assuming the court's failure to give an

additional "focused and directed" instruction constituted error, it was not fundamental. *See Miranda-Cabrera*, 209 Ariz. 220, ¶ 30, 99 P.3d at 42.

## II. Accomplice Liability under § 13-604.01

**¶13** Godoy nevertheless contends he should not be subjected to an enhanced sentence under § 13-604.01 because he was found guilty as an accomplice and was not the person who was actually holding the gun. He argues that had the jury been given the "focused and directed" instruction, it might have concluded his conduct, as an accomplice rather than as the person actually holding the gun, was not sufficiently focused on the children to support a dangerous crimes against children sentencing enhancement.[1]

**¶14** But "[i]n Arizona, a defendant 'is criminally accountable for the conduct of [his accomplices]' if he aids those accomplices in 'the commission of an offense.'" *State v. Phillips*, 202 Ariz. 427, ¶ 35, 46 P.3d 1048, 1056 (2002), *quoting* A.R.S. § 13-303(A)(3) (second alteration in original) (emphasis omitted). Neither the dangerous crimes against children statute, § 13-604.01, nor the accomplice liability statutes, A.R.S. §§ 13-301 and 13-303, create a distinction between principal and accomplice liability; both are treated equally at sentencing. "It is clear when §§ 13-301 and [13]-303 are read together, that an accomplice may be either the principal or an accessory to the crime. In other words, all participants are

[1]Pointing to A.R.S. §§ 13-901.01 and 13-604, Godoy contends that a principal and an accomplice found guilty of the same offense may nevertheless not be found equally accountable for sentencing purposes. However, as he appears to recognize, the differences in sentencing in those statutes stem from differences in the defendants' unique criminal histories, not from the particular level of culpability in the actual offense committed.

criminally accountable as principals, regardless of whether a participant was the accomplice in fact. The law makes no distinction."[2] *State v. Jobe*, 157 Ariz. 328, 331-32, 757 P.2d 604, 607-08 (App. 1988).

**¶15** The jury found Godoy guilty of the two counts of aggravated assault of a minor under fifteen, one of the enumerated dangerous crimes against children. As we have already noted, Godoy and the five other men went to the victims' home with a gun for the purpose of kidnapping his former girlfriend. He knew there were children in the residence before he entered it, and after pistol-whipping Albert, Godoy handed the gun to one of the other men. We reject his argument "that while the six men were acting in concert with respect to the ultimate purpose for the entry, each was acting independently with respect to specific conduct."

**¶16** Under the facts of this case, the applicability of § 13-604.01 is inherent in the jury's verdict. Because we conclude any error in the trial court's failure to give the "focused and directed" jury instruction and the sentence it imposed pursuant to § 13-604.01 did not constitute fundamental error, we need not address whether such error was prejudicial. *See Henderson*, 210 Ariz. at ¶ 20, 115 P.3d at 607-08.

---

[2]In its opening argument, the state suggested Godoy was a principal offender, arguing, "the defendant found out where [Rebecca] was living, that she had new children, with a new boyfriend, and he came to get his revenge. But he didn't come alone. He got five men to go with him . . . to break into Albert C[.]'s home." Based on the evidence presented at trial, we believe a reasonable jury could draw that inference. *See State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005).

## Disposition

**¶17** For the foregoing reasons, we affirm Godoy's sentences.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge